RECORD AND BRIEFS

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No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the decision below, a divided panel of the Ninth Circuit held that 18 U.S.C. 16(b), an important provision of the federal criminal code, is unconstitutional on its face, at least as incorporated through the definition of "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(F), for application in immigration proceedings. That holding warrants this Court's review. The INA's definition of aggravated felony applies to numerous provisions of the INA, and the Ninth Circuit's analysis provided no basis to distinguish Section 16(b)'s criminal applications. Moreover, after the petition for a writ of certiorari was filed, the en banc Fifth Circuit held that Section 16(b) "is not unconstitutionally vague," *United States* v. *Gonzalez-Longoria*, No. 15-40041, 2016 WL 4169127, at *1-*2 (Aug. 5, 2016), and a Second Circuit panel rejected a vagueness challenge to the materially identical definition of "crime of violence" in 18 U.S.C.

924(c)(3)(B), see *United States* v. *Hill*, No. 14-3872-cr, 2016 WL 4120667, at *1, *7-*12 (Aug. 3, 2016). Those decisions conflict with the decision below, the decision of the Seventh Circuit in *United States* v. *Vivas-Ceja*, 808 F.3d 719 (2015), and an intervening decision of the Sixth Circuit, *Shuti* v. *Lynch*, No. 15-3835, 2016 WL 3632539 (July 7, 2016).

Respondent argues (Br. in Opp. 19) that this case is an unsuitable vehicle for resolving the question of Section 16(b)'s constitutionality because the government contends at the threshold that civil immigration laws are not subject to the same vagueness standard as criminal laws. Respondent is correct that, if the Court agrees with the government's position on that threshold question, the Court could uphold Section 16(b) in its immigration applications without resolving whether Section 16(b) is unconstitutionally vague in its criminal applications. But the mirror-image risk would exist if this Court first granted review in a criminal case: If the Court held Section 16(b) unconstitutional in criminal applications, it likely would not resolve the question whether the statute is nevertheless valid in immigration applications. And the Court can resolve the constitutionality of Section 16(b) in both settings by holding in this case that it is constitutional under the standard applicable to criminal laws. Respondent's vehicle objection therefore is not a persuasive ground to deny review.

A. The Ninth Circuit's Holding Is Incorrect

Respondent contends (Br. in Opp. 31) that the question presented does not warrant this Court's review because the Ninth Circuit's holding that Section 16(b) is unconstitutionally vague "flowed from a direct application of this Court's recent decision in

Johnson [v. *United States*, 135 S. Ct. 2551 (2015)]," which held unconstitutional the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii). But as 11 judges of the Fifth Circuit have concluded, joining dissenting Judge Callahan in this case and a unanimous panel of the Second Circuit, concerning the materially identical text in 18 U.S.C. 924(c)(3)(B), that argument is incorrect.

1. At the threshold, the same vagueness standard applicable to criminal laws does not apply to immigration laws with civil consequences. See Pet. 11-16. Respondent erroneously contends (Br. in Opp. 16-19) that this Court's decision in *Jordan* v. *De George*, 341 U.S. 223 (1951), forecloses that argument. As explained in the petition, however, that view overreads *Jordan*—a case in which a vagueness argument was "not raised by the parties nor argued before th[e] Court," *id.* at 229. It is true that in *Jordan* the Court elected to "test [the deportation] statute [at issue in that case] under the established criteria of the 'void for vagueness' doctrine" in light of an argument raised by the dissent. *Id.* at 231. But the issue was not briefed, and the Court had no occasion to decide whether a lesser standard should apply to civil immigration laws because the Court concluded that the statute satisfied the criminal-law standard. See *id.* at 231-232.

Respondent, moreover, does not address the fact that the two constitutional concerns undergirding the vagueness doctrine in criminal cases—ensuring fair notice and avoiding arbitrary enforcement—have far less relevance for civil immigration laws. See Pet. 12-13. Unlike criminal laws, deportation laws can apply retroactively, see *Marcello* v. *Bonds*, 349 U.S. 302, 314

(1955), substantially if not entirely eroding any fair-notice expectation. And immigration laws can be given single, authoritative interpretations by the Executive Branch in immigration proceedings, through the Attorney General and the Board of Immigration Appeals, promoting consistent enforcement across cases.

Respondent contends (Br. in Opp. 18-19) that even if a different vagueness standard applies to civil immigration statutes, such a standard would not apply here because the INA's definition of "aggravated felony" is incorporated into certain criminal provisions (as the petition notes, see Pet. 16 n.2). That contention is mistaken. The fact that language appearing in one statute is made applicable under another statute by cross-reference does not mean that the constitutionality of the language must be reviewed under the same standard in the different context of the latter statute, where the same individual rights and interests are not implicated.

2. With respect to the question whether Section 16(b) satisfies the criminal-law vagueness standard, respondent erroneously contends (Br. in Opp. 20) that Section 16(b) and the ACCA's residual clause have only "minor textual differences." As the 11-4 majority of the en banc Fifth Circuit recently held, the language of Section 16(b) is materially different from the language of the ACCA's residual clause.

a. The petition explains (at 17-18) that a critical component of this Court's holding in *Johnson* was that the ACCA's residual clause's "ordinary case" analysis "goes beyond evaluating the chances that the physical acts that make up the crime will injure someone" and requires a court to determine whether a "risk of inju-

ry arises because the [offender] might engage in violence after" completing the offense, *Johnson*, 135 S. Ct. at 2557. In contrast, the plain text of Section 16(b) requires a substantial risk that "physical force" will be used "*in the course of committing the offense*." 18 U.S.C. 16(b) (emphasis added); see *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004). As the en banc Fifth Circuit explained, Section 16(b) is "notably more narrow" and "predictively more sound" than the ACCA's residual clause because it "does not allow courts to consider conduct or events occurring after the crime is complete." *Gonzalez-Longoria*, 2016 WL 4169127, at *3-*4; accord *Hill*, 2016 WL 4120667, at *10.

Respondent nevertheless asserts (Br. in Opp. 20-21) that Section 16(b) also requires consideration of conduct that takes place after completion of the offense. His argument overlooks the key phrase "in the course of committing the offense." And respondent is incorrect that if the risk inquiry were limited to risks arising during the commission of the offense, Section 16(b) would be redundant with Section 16(a). Section 16(a) encompasses offenses that have as an *element* the use of physical force against the person or property of another. Section 16(b), in contrast, encompasses offenses that inherently entail a substantial *risk* of the use of force against person or property.

Respondent's other efforts to reconcile the decision below with the text of Section 16(b) are equally unavailing. Respondent observes (Br. in Opp. 21-22), for example, that this Court has construed the term "physical force" in different ways depending on the statutory context. But far from demonstrating vagueness, that observation confirms that the phrase is amenable to interpretation: In none of those prece-

dents did the Court conclude that the phrase is impermissibly vague.

Respondent also suggests (Br. in Opp. 3, 25) that this Court's summary description of *Johnson*'s holding in *Welch* v. *United States*, 136 S. Ct. 1257, 1262 (2016), establishes that *Johnson* turned entirely on the fact that the ACCA's residual clause requires an "ordinary case" analysis. But *Welch*, which held that *Johnson* applies retroactively in the collateral review of ACCA sentences, did not purport to alter *Johnson*'s statute-specific vagueness analysis, which expressly rested on multiple features of the statute and the multiple failed efforts to interpret it.

b. The petition also explains (at 19-21) that *Johnson* concluded that the ACCA's residual clause gave rise to uncertainty about how much risk was necessary to satisfy the statute because it linked the risk level to a set of dissimilar exemplar offenses. That feature is absent from Section 16(b) as well. Indeed, the Second Circuit recently concluded that the "most obvious[]" distinction between the Section 16(b) definition and that of the ACCA's residual clause is that the former "contains no mystifying list of offenses and no indeterminate 'otherwise' phraseology." *Hill*, 2016 WL 4120667, at *9 (discussing materially identical definition at 18 U.S.C. 924(c)(3)(B)); accord *Gonzalez-Longoria*, 2016 WL 4169127, at *4 (discussing Section 16(b)).

Echoing the Ninth Circuit majority, respondent asserts (Br. in Opp. 24) that the lack of "a confusing list of examples," *Johnson*, 135 S. Ct. at 2561, makes Section 16(b) *more* vague. That contention cannot be reconciled with *Johnson*'s vagueness analysis. This Court explicitly reasoned that the list of exemplar

crimes magnified the indeterminacy of the ACCA's residual clause. See 135 S. Ct. at 2558, 2561.

c. Finally, the petition explains (at 22-25) that precisely because of the more targeted language of Section 16(b), that statute has not generated anywhere close to the degree of interpretive difficulty in this Court and among lower courts as the ACCA's residual clause—a driving factor in *Johnson*, see 135 S. Ct. at 2558-2560, 2562-2563. The Second and Fifth Circuits have now confirmed that the particular language of Section 16(b) "has no history of 'repeated attempts and repeated failures' on the part of courts 'to craft a principled and objective standard' out of its terms." *Hill*, 2016 WL 4120667, at *10 (quoting *Johnson*, 135 S. Ct. at 2558); see *Gonzalez-Longoria*, 2016 WL 4169127, at *6.

Respondent strives to portray Section 16(b) as generating ACCA-like interpretive confusion (Br. in Opp. 25-27), identifying two purported conflicts of authority, one over the offense of unauthorized use of a motor vehicle and the other over the offense of burglary of a vehicle. The first of those conflicts, however, does not exist; respondent overlooks that the Fifth Circuit overruled its pre-*Leocal* precedent in 2009 and held that unauthorized use of a motor vehicle is not a crime of violence under Section 16(b). See *United States* v. *Armendariz-Moreno*, 571 F.3d 490, 491 (per curiam). While respondent asserts that there are other conflicts as well, he does not specify what they are and their nature and significance. And in any event, the existence of some differences over particular applications of a statute that has been in existence for 30 years, and that was intended to cover a wide range of dangerous criminal offenses under federal

and state law, would fall far short of establishing that the statute is unworkably opaque.

B. The Ninth Circuit's Decision Warrants This Court's Review

1. A divided Ninth Circuit panel has held an important provision of an Act of Congress unconstitutional, which alone justifies review by this Court. Even if that decision were somehow limited to the immigration context, the INA's definition of "aggravated felony" has numerous applications throughout federal immigration law. See Pet. 27-29. And the Ninth Circuit has the largest immigration docket in the country.

Respondent attempts (Br. in Opp. 31-33) to downplay the significance of the Ninth Circuit's holding on the ground that an alien in the Ninth Circuit who would have been removable and ineligible for discretionary relief because he was convicted of a Section 16(b) offense may nevertheless ultimately be removed on some other ground. Although that will be true in some cases, the Ninth Circuit's divided decision unquestionably shields a category of aliens from immigration-law consequences that Congress plainly intended for aliens with convictions for violent crimes, on the ground that Congress failed to enact a sufficiently determinate statute. Such an important holding should be reviewed by this Court.

2. Respondent also does not deny that the courts of appeals are divided on the constitutionality of Section 16(b) and that the conflict is unlikely to be resolved without this Court's intervention. As noted above, after the petition was filed, the en banc Fifth Circuit held that Section 16(b), as applied through the INA's definition of aggravated felony (as itself

incorporated into a Sentencing Guideline), is not void for vagueness. See *Gonzalez-Longoria*, 2016 WL 4169127, at *1-*2. In addition, a Second Circuit panel recently upheld against a vagueness challenge the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B), which (unlike the ACCA's residual clause) is materially identical to Section 16(b). See *Hill*, 2016 WL 4120667, at *1, *7-*12. The Second Circuit found the Ninth Circuit's decision in this case "unpersuasive" because the decision "underestimates—or misunderstands—the significance of the list of enumerated offenses in the ACCA's residual clause to the decision in *Johnson*," "ignore[s] or minimize[s] the other textual distinctions between the residual clause and the language of § 16(b)," and "dismisses the significance of the Supreme Court's fraught precedent interpreting the ACCA's residual clause." *Id.* at *10-*11.

The petition argues (at 26-27) that the decision below also conflicts with the Sixth Circuit's decision in *United States* v. *Taylor*, 814 F.3d 340 (2016), which, like *Hill*, rejected a vagueness challenge to the definition of "crime of violence" in 18 U.S.C. 924(c)(3)(B). After the petition was filed, however, a different panel of the Sixth Circuit held that Section 16(b), as applied through the INA's definition of aggravated felony, is unconstitutionally vague. See *Shuti*, 2016 WL 3632539, at *9. *Shuti* distinguished *Taylor* by reasoning that Section 924(c)(3)(B) does not require courts to use the "categorical approach" to determine whether an offense presents the requisite level of risk, but rather requires a jury to determine whether a defendant's particular conduct presented sufficient risk. 2016 WL 3632539, at *8. That reasoning, however,

conflicts with the near-unanimous view of other circuits that Section 924(c)(3)(B), like Section 16(b), requires a categorical approach to determining whether a particular offense meets the definition of "crime of violence."[1] Indeed, *Taylor* itself said that Section 924(c)(3)(B) "requires the application of a categorical approach," 814 F.3d at 378, and four days after *Shuti*, a different Sixth Circuit panel reaffirmed in a precedential decision that the Sixth Circuit "use[s] a 'categorical approach' to determine whether an offense constitutes a 'crime of violence' for purposes of § 924(c)(3)," *United States* v. *Rafidi*, No. 15-4095, 2016 WL 3670273, at *4 (July 11, 2016). That the Sixth Circuit has issued two decisions reaching opposite, irreconcilable conclusions about whether the same language is vague, echoing the broader circuit conflict, underscores the need for this Court's review.[2]

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[1] See *United States* v. *Acosta*, 470 F.3d 132, 134-137 (2d Cir. 2006) (per curiam), cert. denied, 552 U.S. 1037 (2007); *United States* v. *Fuertes*, 805 F.3d 485, 497-498 (4th Cir. 2015), cert. denied, 136 S. Ct. 1220 (2016); *United States* v. *Williams*, 343 F.3d 423, 431-434 (5th Cir.), cert. denied, 540 U.S. 1093 (2003); *United States* v. *Amparo*, 68 F.3d 1222, 1224-1226 (9th Cir. 1995), cert. denied, 516 U.S. 1164 (1996); *United States* v. *Serafin*, 562 F.3d 1105, 1107-1108 (10th Cir. 2009); *United States* v. *Kennedy*, 133 F.3d 53, 56-58 (D.C. Cir. 1998); compare *United States* v. *Prickett*, No. 15-3486, 2016 WL 4010515, at *1 (8th Cir. July 27, 2016) (per curiam) (non-categorical approach) (citation and internal quotation marks omitted), with *United States* v. *Moore*, 38 F.3d 977, 979 (8th Cir. 1994) (categorical approach).

[2] Because *Shuti*'s statement that the categorical approach is inapplicable under Section 924(c)(3)(B) conflicts with the Sixth Circuit's decisions in *Taylor* and *Rafidi* holding that the categorical approach is applicable, the Acting Solicitor General has authorized the filing of a petition for rehearing en banc in *Shuti* challenging the panel's construction of Section 924(c)(3)(B) and its result-

3. Although acknowledging the circuit conflict, respondent contends (Br. in Opp. 27) that review would be premature because only four circuits have decided the question presented. But among those four are the two circuits with by far the largest immigration dockets in the country, and in total 24 federal appellate judges (including one district judge sitting by designation) have now considered the question, dividing 12-12, in addition to the six judges of the Second and Sixth Circuits who considered the materially identical language of Section 924(c)(3)(B). Further percolation is unlikely to furnish additional insight into whether Section 16(b)'s language is impermissibly vague.

C. This Case Is A Suitable Vehicle To Resolve The Question Presented

Respondent contends (Br. in Opp. 19) that this case is an inadequate vehicle for resolving whether Section 16(b) is unconstitutionally vague because the Court could reverse the judgment below by holding that civil immigration laws are subject to a less rigorous vagueness standard and that Section 16(b) at least satisfies that standard. Such a holding, respondent correctly observes (*ibid.*), "would leave open the question whether the clause is nevertheless unconstitutional under *Johnson* * * * in the context of a criminal prosecution or sentencing proceeding." *Ibid.*

That possibility, however, does not make a criminal case a preferable vehicle, because a criminal case would present the mirror-image risk: If the Court were to hold that Section 16(b) is unconstitutional in

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ing holding that Section 16(b) is unconstitutional. But however the Sixth Circuit resolves that petition, the circuit conflict regarding the constitutionality of Section 16(b) will remain.

the criminal-law context, it would not have the occasion to resolve the question whether the statute is nevertheless constitutional in the immigration context. Whichever type of case this Court hears therefore presents the possibility that the question of Section 16(b)'s constitutionality will not be resolved for the other type of case. And for the reasons stated here and in the certiorari petition, Section 16(b) is constitutional under the standards applicable to criminal laws, and the Court can resolve this case on that ground. Accordingly, given the importance of Section 16(b) for both immigration law and criminal law, this Court's review in this case is warranted.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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